84-397

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

TERM, 1984

LEONARD MELVIN WEISSER and
NANA HART,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Appeal from the United States Court of Appeals for the Eighth Circuit

Petition for a Writ of Certiorari to the Supreme Court of the United States of America

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HIPP

IN THE SUPREME COURT OF THE
UNITED STATES

_____ TERM, 1984

NO. _____

LEONARD MELVIN WEISSER and
NANA HART,
Petitioners,

* *

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE

UNITED STATES OF AMERICA

* *

QUESTIONS PRESENTED

I. WHETHER OR NOT THE INTERSTATE TRANSPORTATION AND SALE OF TRAVELERS EXPRESS MONEY ORDERS STOLEN IN BLANK AND WITHOUT AUTHORITY IMPRINTED WITH AN AMOUNT ARE FALSELY MADE OR FORGED SECURITIES UNDER SECTION 2311 OF TITLE 18 OF THE UNITED STATES CODE, WHERE THE MONEY ORDERS LACKED, AMONG OTHER THINGS, THE SIGNATURE OR IDENTIFICATION OF DRAWER OR SENDER AND THE PAYEE DESIGNATION.

II. WHETHER THE GOVERNMENT'S SEARCH WARRANT AFFIDAVIT RELIED UPON BY THE FEDERAL MAGISTRATE WHO ISSUED A SEARCH WARRANT TO SEARCH THE RESIDENCE OF DEFENDANT HART PROVIDED THE MAGISTRATE WITH A SUBSTANTIAL BASIS FOR CONCLUDING THE EXISTENCE OF PROBABLE CAUSE TO ISSUE THE SEARCH WARRANT.

IN THE SUPREME COURT OF THE
UNITED STATES

_____ TERM, 1984

NO. _____

LEONARD MELVIN WEISSER and
NANA HART,
Petitioners

* *

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Gearing v. United States, 432 F. 2d 1038, 1041 (5th Cir., 1970)

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Boyd v. United States, 442 F. 2d 1283. 1285 (10th Cir., 1971)

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Franks v. Delaware, 438 U.S. 154, 155-156, 57 L. Ed. 2d 667, 98 S. Ct. 2674 (1978)

Nathanson v. United States, 290 U.S. 41, 54 S. Ct. 11, 78 L. Ed. 159 (1933)

Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964)

OPINIONS

The Opinion rendered by the United States Court of Appeals for the Eighth Circuit, filed June 11, 1984, is hereto attached and designated as Appendix A to this Petition for Writ of Certiorari.

JURISDICTION

The Petitioners, Leonard Melvin Weisser and Nana Hart, were charged pursuant to Bills of Indictment filed March 24, 1983, for having violated Title 18 of the United States Code, Section 2314 and Title 18 of the United States Code, Section 2315. The Petitioners were tried in the United States District Court for the Eastern District of Missouri, Eastern Division, before a jury, the Honorable Clyde S. Cahill, United States District Court Judge, presiding, on June 13 through June 16, 1983. The Petitioners were duly convicted by jury June 17, 1983, and by judgments of the trial court entered herein August 19, 1983. The Petitioner,

Leonard Melvin Weisser, was sentenced to five (5) years on Count One of his Bill of Indictment and to five (5) years on Count Two of his Bill of Indictment, the sentence on Count Two to run concurrently with that of Count One. The Petitioner, Nana Hart, was sentenced to fifteen (15) months on Count One of her Bill of Indictment and imposition of sentence on Count Two of her Bill of Indictment was suspended. Petitioner, Nana Hart, was placed on probation for a three (3) year period after completion of her sentence imposed on Count One of her Bill of Indictment. The Petitioners gave notice of appeal to the United States Court of Appeals for the Eighth Circuit. This case was decided March 12, 1984, by Judges Ross, John R. Gibson, and Bowman of the United States Court of Appeals for the Eighth Circuit.

Petitioners filed their Petition for Rehearing in the United States Court of

Appeals for the Eighth Circuit June 23, 1984. Their Petition for Rehearing was denied July 16, 1984.

CONSTITUTIONAL PROVISIONS

The Fourth Amendment of the United States Constitution, which reads as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

STATUTORY PROVISIONS

Section 2311 of Title 18 of the United States Code, which defines "securities" as follows:

> "Securities" includes any note, stock certificate, bond, debenture, check, draft, warrant, traveler's check, letter of credit, warehouse receipt, negotiable bill of lading, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate,

> preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of interest in property, tangible or intangible; instrument or document or writing evidencing ownership of goods, wares, and merchandise, or transferring or assigning any right, title, or interest in or to goods, wares and merchandise; or, in general, any instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, warrant, or right to subscribe to or purchase any of the foregoing, or any forged, counterfeited, or spurious representation of any of the foregoing.

The third paragraph of Section 2314 of Title 18 of the United States Code, which reads as follows:

> Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered or counterfeited; . . .
>
> shall be fined not more than $10,000 or imprisoned not more than ten years or both.

The second paragraph of Section 2315 of Title 18 of the United States Code, which reads as follows:

> Whoever receives, conceals, stores, barters, sells, or disposing of any falsely made, forged, altered, or counterfeited securities or tax stamps, or pledges or accepts as security for a loan any falsely made, forged, altered, or counterfeited securities or tax stamps, moving as or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been so falsely made, forged, altered, or counterfeited; . . .
>
> shall be fined not more than $10,000 or imprisoned not more than ten years or both.

Paragraphs (b) and (e) of Rule 12 of the Federal Rules of Criminal Procedure, which read as follows:

> (b) Pretrial Motions. Any defense, objection or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:

(1) Defenses and objections based on defects in the institution of the prosecution; or

(2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the Court or to charge an offense which objections shall be noticed by the Court at any time during the pendency of the proceedings); or

(3) Motions to suppress evidence; or

(4) Requests for discovery under Rule 16; or

(5) Requests for a severance of charges or defendants under Rules 14.

(e) Ruling on Motion. A motion made before trial shall be determined before trial unless the Court, for good cause, orders that it be deferred for determination at the trial of the general issue or until after verdict, but no such determination shall be deferred if a party's right to appeal is adversely effected. Where factual issues are involved in determining a motion, the Court shall state its essential findings on the record.

STATEMENT OF THE CASE

The petitioners were convicted of selling four Travelers Express Money Orders to a Federal Government informant in St. Louis, Missouri on March 11, 1983. The money orders were part of a lot that had been stolen in blank from a grocery store in Cahokia, Illinois in December, 1982, and subsequently imprinted with an amount using a check protector device other than one supplied by the Travelers Express Company. It is not known who stole the money orders or who imprinted them with the check protector. When the money orders were sold to the Government informant, they were incomplete on their face except for the imprinted amount, lacking the identity of the drawer or sender, a payee designation, an agency symbol and a date.

The defendants were arrested and incarcerated on March 15, 1983. While the defendants were incarcerated, the Government

obtained a search warrant from a Federal Magistrate to search the residence of the defendant Hart in Columbia, Illinois. The warrant was issued based upon the affidavit of Agent Keith Sincox of the Federal Secret Service. A copy of the search warrant affidavit is attached as Appendix B hereof. In searching the residence of defendant Hart, the Government discovered a box containing 88 additional money orders from the lot stolen from Flinn's Market in Cahokia, Illinois and a handwritten note the Government argued was an inventory list of the money orders originally contained in the box.

The Secret Service case agent in charge of the investigation, Agent Steffen, obtained the search warrant from the Federal Magistrate based upon the search warrant affidavit of his subordinate, Agent Keith Sincox. No evidence was presented to the

Federal Magistrate who issued the search warrant other than Agent Sincox's affidavit.

The Sincox affidavit recites conclusions of criminal activity on the part of the defendants based upon Agent Sincox's personal belief, his alleged review of unspecified evidence and his interviews of unidentified witnesses. At the conclusion of the affidavit, Agent Sincox states that he verified an admission by defendant Hart that other of the stolen money orders were located at her residence in Columbia, Illinois by listening to a Government electronic surveillance recording of a conversation between an unidentified Government informant and defendant Hart on March 15, 1984.

Before and after the Government's editing and enhancement of the disputed March 15, 1983 Government surveillance tape, the inculpatory admission of defendant Hart, testified to by Agent Sincox, is inaudible.

What is audible on the tape of the 15th of March is an exculpatory statement by defendant Hart denying that other money orders were located at her residence.

The defendants filed a motion to suppress the evidence seized from defendant Hart's residence pursuant to the search warrant. After a pre-trial hearing where the Government's edited and enhanced tape recording of the disputed conversation between defendant Hart and the Government's informant was presented and played to the U.S. District Court Judge who presided at the hearing and subsequent trial of the case, the trial judge took the matter under advisement in order to replay the disputed tape in chambers on special equipment of the Court. Subsequently he denied the motion without rendering findings of fact of record on the motion. The defendants filed a motion seeking findings of fact on the trial judge's

denial of their motion to suppress which was also denied by the trial court.

At the trial of the case, over defendant's objection, the box of 88 money orders and the handwritten note seized from defendant Hart's residence was admitted into evidence.

At the conclusion of the presentation of evidence in the Government's case, the petitioners moved for dismissal of the charges against them due to lack of subject matter jurisdiction of the Court on the ground that the money orders involved in the case were not securities under the federal statutes charges. The motion was denied by the trial court with leave to refile at the conclusion of the trial of the case. At the conclusion of the trial, petitioners renewed their motion to dismiss and the trial judge again denied and overruled their motion. The jury returned verdicts against both defendants on June 17, 1983, and the trial

court entered judgments against each of the defendants on both Counts One and Two of their Indictments August 19, 1983.

ARGUMENTS

The holding of the United States Court of Appeals for the Eighth Circuit that the money orders involved in this case are "evidence of indebtedness" and thus securities under the statutes charged so departed from the recognized legal authorities and legal opinions of the United States Courts of Appeals of the Eighth and other Circuits as to call for an exercise of the United States Supreme Court's supervision in this case. The exercise of supervision by the United States Supreme Court is necessary and appropriate because the conflict here created by the decision of the Eighth Circuit Court of Appeals involves an important question of Federal law which has not been, but should be, settled by the United States Supreme Court.

In finding the money orders to be "evidence of indebtedness" and thus "securities" under Section 2311 of Title 18 of the United States Code, the Eighth Circuit Court of Appeals relied upon United States v. Buckles (8th Cir., 1974), 495 F. 2d 1377, 1379 and United States v. Smith (5th Cir., 1971), 452 F. 2d 638, 640, cert. denied, 406 U.S. 910 (1972). The application of said Buckles and Smith decision to the facts presented in this case is in conflict with prior and subsequent decisions of the Eighth and other United States Courts of Appeals. See: United States v. Rochen (8th Cir., 1978), 575 F. 2d 191, 193-194 (upon completion money orders become securities under 18 U.S.C. 2311 and completion involves a mechanical stamping of the money order blank with the amount of the money order and identification of the purchaser or sender of the money order and the payee thereof; United States v. Jackson (8th Cir., 1978),

576 F. 2d 749, 755 (blank stock certificates lacking essential ingredients of a genuine stock certificate are not securities within the definition of 18 U.S.C. 2311); Gearing v. United States (5th Cir., 1970), 432 F. 2d 1038, 1041 and United States v. Bedgood (5th Cir. 1972), 453 F. 2d 988, 990 (insertion of the name of the payee on a money order is necessary to make it complete); Castle v. United States (5th Cir., 1964), 287 F. 2d 657, 660 (blank money orders become securities when the names and amounts are filled in); United States v. Smith (6th Cir., 1970), 426 F. 2d 275, 276 (blank money orders are not evidence of obligation on the part of the issuing company and it is necessary to insert the agent's symbol, an amount, a sender's name and the name of the payee in order to create an obligation; United States v. DiPietto (7th Cir., 1968), 396 F. 2d 283, 286 (money orders with genuine signatures do not appear to evidence an obligation until

the amount and the name of the payee are inserted); United States v. Tacher (10th Cir., 1972), 453 F. 2d 244 and Boyd v. United States (10th Cir., 1971), 442 F. 2d 1283, 1285 (on a money order, it is necessary to insert the agent's symbol, an amount, a sender's name, and the name of the payee in order to create an obligation).

When a commercial money order becomes sufficiently complete by unauthorized insertion or alteration to create an evidence of obligation on the part of the issuing company under Section 2311 of Title 18 of the United States Code, is an important question of Federal law not heretofore settled by the United States Supreme Court and calls for the exercise of the United States Supreme Court's supervision to resolve present and future conflicts in the United States Courts of Appeal.

Secondly, the exercise of supervision by the United States Supreme Court should

be applied in this case due to the fact that the admission of the evidence seized from defendant Hart's residence relates to the protection guaranteed to the defendants pursuant to the Fourth Amendment of the United States Constitution; and, the decision of the United States Court of Appeals for the Eighth Circuit is in conflict with applicable decisions of the United States Supreme Court.

In finding the Government's search warrant affidavit provided a substantial basis for the issuing Magistrate to find probable cause to issue the search warrant to search the residence of defendant Hart, the United States Court of Appeals for the Eighth Circuit relied upon United States v. Apker, 705 F. 2d 293, 303 (8th Cir., 1983), cert. denied, 104 S. Ct. 996 (1984) and Illinois v. Gates, ____ U.S. ____, 103 S. Ct. 2317 (1983).

Defendants submit that the false statement of search warrant affiant, Secret Service Agent Sincox, should be struck in analyzing the sufficiency of his affidavit. Franks v. Delaware, 438 U.S. 154, 155-156, 57 L. Ed. 2d 667, 98 S. Ct. 2674 (1978). Absent the false allegation of Agent Sincox that he verified an admission by defendant Hart that other money orders were at her home, his search warrant affidavit states only conclusions that he had drawn without any showing of the basis of his knowledge on which he made those conclusions or any demonstrated reliability or corroboration of the information he was receiving from the paid Government informant on whom he relied. Illinois v. Gates, ____ U.S. ____, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983); Nathanson v. United States, 290 U.S. 41, 54 S. Ct. 11, 78 L. Ed. 159 (1933); and, Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964).

For the reasons stated above, the United States Supreme Court should grant this petition for a writ of certiorari, review the record, and write an opinion in this case.

WHEREFORE, the petitioners, Leonard Melvin Weisser and Nana Hart, pray the Court that this petition for a writ of certiorari be granted, that execution of judgment and sentences imposed by the trial judge of the United States District Court for the Eastern District of Missouri be stayed pending a review by the United States Supreme Court, and for such other and further relief as the United States Supreme Court deems the petitioners, Leonard Melvin Weisser and Nana Hart, justly entitled.

Respectfully submitted, this the 7th day of September, ~~1984~~.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 83-2181

United States of America,	*	
	*	
Appellee,	*	
	*	Appeal from
v.	*	the United
	*	States
	*	District
Leonard Melvin Weisser	*	Court for the
and Nana Hart,	*	Eastern Dis-
	*	trict of
Appellants.	*	Missouri

Submitted: March 12, 1984

Filed: June 11, 1984

Before ROSS, JOHN R. GIBSON, and BOWMAN, Circuit Judges.

ROSS, Circuit Judge.

The defendants, Weisser and Hart, appeal from guilty verdicts on two counts charging them with transporting four falsely

made and forged securities in violation of 18 U.S.C. § 2314 and for selling these securities knowing them to have been falsely made and forged in violation of 18 U.S.C. § 2315.[1]

On appeal Weisser and Hart allege numerous grounds for reversal. We affirm the conviction.

Facts

On December 17, 1982, Flinn's Market was burglarized and 465 blank Travelers Express money orders were taken. Donna Niemann, a state probationer was allegedly contacted by Weisser in March of 1983 about the purchase of some checks made out for $175.00. Niemann contacted a Detective Eichelberger who set up a meeting with Special Agent Steffen. Niemann became an informant and thereafter wore recording and

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1. Weisser was also charged with a third count but was found not guilty by the jury.

transmitting devices. She was monitored by the police and Secret Service when she dealt with Weisser and later with Hart.

Weisser offered to get Niemann checks in exchange for $250.00 and her truck. Weisser did not show up with the checks at the scheduled time as he had originally promised. Instead, Niemann met at a later date with Nana Hart and Weisser. Hart stated she had four $145.00 money orders and that others were distributed elsewhere. Niemann paid Hart for the money orders and Hart gave part of the money to Weisser. It was agreed that Niemann would buy more money orders the following week.

Weisser was arrested and two of the $50 bills on him at the time of the arrest were those photocopied by detectives before Niemann was given the payoff money. Hart's home was searched pursuant to a search warrant and 88 Travelers Express money orders filled in with various amounts were found.

Also, a note was found that appeared to be a tally of the checks and their individual amounts. The money orders picked up by Niemann and those at Hart's house were those stolen from Flinn's grocery.

"Forged" and "Falsely Made" Securities

Weisser and Hart argue that the Travelers Express money orders in question were not "securities" under the statutes charged and were not "forged and falsely made" within the definition of the law. 18 U.S.C. § 2311 specifically enumerates notes, bonds, stock certificates, travelers checks, evidence of indebtedness, and other documents as "securities" under that section of the Code. "Money orders" are not specifically included.

Appellants argue that to be a security, a document must be sufficiently complete on its face to create such evidence of an obligation of payment that an innocent person would accept the same to his or her prejudice

in reliance thereon. Pines v. United States, 123 F. 2d 825, 828 (8th Cir. 1941). Weisser and Hart analogyze their case to the situation in United States v. Jackson, 576 F. 2d 749 (8th Cir.), cert. denied, 439 U.S. 858 (1978) where the court held that blank stock certificates in their incomplete form were not "securities" under section 2311.

We agree with the government that these money orders are "evidence of indebtedness" and thus a security under the statute. United States v. Buckles, 495 F. 2d 1377, 1379 (8th Cir. 1974). We think that Buckles is controlling in this case. First, a Travelers Express money order is valid when imprinted with an amount on a machine furnished by Travelers Express. United States v. Smith, 452 F. 2d 638, 640 (5th Cir. 1971), cert. denied, 406 U.S 910 (1972). Here, an unauthorized machine was used to imprint the checks. This meets the "falsely made" or "forged" definition of the statute, and such

insertion was done with the intent to defraud as required by the statute. Consequently, we affirm on this issue.

Evidence on Electronic Surveillance Tapes

Appellants next argue that the district court erred in admitting into evidence that portion of the government's original and composite electronic surveillance tapes of March 11, 1983, which contained evidence of other crimes similar to those charged in count II of the indictment.

The government provided defendants with copies of the original and composite tapes. However, shortly before trial a new tape emerged in which Niemann spoke of "other crimes." Defense counsel requested suppression of that portion of the tapes because of surprise and prejudice. The conversation was between Hart and Niemann, but Hart used the word "we" in her conversation.

In Hart's case, and especially in Weisser's case, it is argued the "other crimes" evidence is not admissible, because it is not "clear and convincing." United States v. Calvert, 523 F. 2d 895 (8th Cir. 1975), cert. denied, 424 U.S. 911 (1976); United States v. Oliver, 525 F. 2d 731 (8th Cir. 1975), cert. denied, 424 U.S. 973 (1976).

The government argues that this evidence is admissible, since it furnishes evidence of part of the context of the crime. See United States v. Masters, 622 F. 2d 83 (4th Cir. 1974). The statements objected to were part of the res gestae and therefore admissible. United States v. Moore, No. 83-2173 (8th Cir. filed May 15, 1984); United States v. Howard, 504 F. 2d 1281, 1284 (8th Cir. 1974). We hold that under Howard, this tape was admissible to show scheme, intent and state of mind.

Jury Instructions

Hart and Weisser argue that it was reversible error to give Instruction No. 24 on constructive possession of property.

Instruction No. 23, tendered by the government and correctly given by the court, defined constructive possession as follows:

> A person who, although not in actual possession, knowingly has both the power and the intention, at a given time, to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it.

Instruction No. 24, based upon United States v. Jones, 308 F. 2d 26 (2d Cir. 1962), reads as follows:

> A person having a working relationship or a sufficient association with those having physical custody of the money orders so as to enable him to assure their production, without difficulty, to a customer as a matter of course has constructive possession. You may find a defendant has constructive possession of money orders if you find he had set the price for the money orders, had the final say

as to the means of transfer, or was able to assure delivery.

Hart and Weisser argue that Instruction No. 24 was duplicitous of and conflicted with Instruction No. 23, that the element of intent should have been included, that the evidence was insufficient to support it, and that the instruction was prejudicial to both defendants. We disagree. The district court correctly applied the law to the facts, and the evidence was sufficient to support this instruction. The jury instructions when viewed as a whole were sufficient. See United States v. Parisien, 574 F. 2d 974, 977 (8th Cir.), cert. denied, 439 U.S. 850 (1978); United States v. Fallen, 498 F. 2d 172, 177 (8th Cir. 1974). We have reviewed the remaining alleged errors regarding jury instructions and find them to be without merit.

Probable Cause to Issue a Search Warrant

Next, Hart and Weisser argue that the box of 88 money orders and the note should have been suppressed. Defendants submit that no probable cause existed to issue the search warrant even under Illinois v. Gates, ____ U.S. ____, 103 S. Ct. 2317 (1983). The affidavit, it is alleged, is based entirely on hearsay and contained no allegations of personal knowledge or first-hand observation.

The district court properly refused to quash the search warrant and suppress the evidence seized. The special agent who helped with visual surveillance and monitoring stated in his affidavit the facts of the burglary, his personal belief, a review of the evidence, and interviews with witnesses.

As we recently stated: "Probable cause to search requires (1) a finding of probability of criminal activity, and (2) a

finding or probability of concealment of evidence on specific premises." United States v. Apker, 705 F. 2d 293, 303 (8th Cir. 1983), cert. denied, 104 S. Ct. 996 (1984). We agree that the facts in this case were sufficiently trustworthy and under the "totality of the circumstances" probable cause existed.[2] Illinois v. Gates, supra.

We have reviewed the remaining contentions on appeal and find them to be without merit. Accordingly, we affirm the district court.

A true copy.

Attest

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APPEALS, EIGHTH CIRCUIT

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2. Weisser and Hart also allege that "false statements" were made in violation of Franks v. Delaware, 438 U.S. 154, 156 (1978). We find no merit to this contention.

APPENDIX B

AFFIDAVIT

The following information is based upon personal belief, a review of the evidence, and interviews of witnesses:

On or about December 16, 1982, a burglary occurred at Flinn's Market at 2800 Camp Jackson Road, Cahokia, Illinois. Among the items stolen were 465 blank Travelers Express Money Orders and a check-protector device for imprinting numerals on the money orders.

On or about March 9, 1983, a confidential informant met in St. Louis, Missouri at Boomer's Tavern with Leonard M. Weisser and Weisser agreed to sell the informant seven (7) of these stolen money orders in the amount of $175.00 each for a total price of $200.00.

On or about March 11, 1983, Weisser and the informant met with Nana Hart Dethrow about the money orders. Dethrow takes the

informant to 7217 Pennsylvania Avenue in St. Louis, Missouri, where Dethrow gives the informant four (4) Travelers Express Money Orders. Dethrow states that the rest of the checks are at her home in Illinois and that they have numerical dollar amounts on them. The informant attempted to pay Dethrow, but Dethrow said that the payment should be made directly to Weisser. The informant and Dethrow returned to Boomer's Tavern where the informant paid Dethrow, who immediately gave the money to Weisser. The informant and Weisser and Dethrow had discussions about bringing more of the money orders from Illinois to Missouri for sale.

Dethrow lives at Rural Route 2, Box 273, Columbia, Illinois, 62236.

Dethrow, at approximately 11:00 AM on March 15, 1983, stated that the remaining stolen money orders were located at her residence in Columbia, Illinois. this statement was recorded by consensual

monitoring by the aforementioned informant and has been verified by listening to the recording by Affiant.

REASONABLE CAUSE FOR SEARCH AFTER DAYTIME

The two primary suspects in this case are LEONARD MELVIN WEISSER and NANA HART DETHROW.

WEISSER and DETHROW were arrested in St. Louis, Missouri on Tuesday, March 15, 1983, on a criminal complaint issued by a Federal Magistrate for violation of 18 USC 2314 involving some of the large volume of stolen money orders.

Upon their anticipated release on March 16, 1983, it is reasonable to believe that they will dispose of and/or destroy the remaining money orders so that they cannot be used as evidence against them.

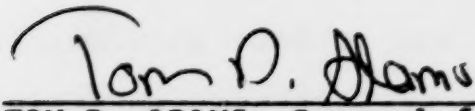
Additionally, both defendants will be allowed telephone privileges this evening from custody and they may well use this opportunity to talk with co-conspirators

regarding the destruction of the remaining money orders.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Petition for a Writ of Certiorari to the Supreme Court of the United States of America was duly served upon opposing counsel by depositing a copy of the same with the United States Mail at the Post Office in Columbia, Illinois, in an envelope, with postage prepaid, addressed as follows:

Solicitor General
United States Department of Justice
Washington, D. C. 20530



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Office - Supreme Court, U.S.
FILED
DEC 10 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-397

In the Supreme Court of the United States

OCTOBER TERM, 1984

LEONARD MELVIN WEISSER AND NANA HART, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-397

LEONARD MELVIN WEISSER AND NANA HART, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that forged money orders are not "securities" within the meaning of 18 U.S.C. 2314 and 2315, and that the affidavit for a search warrant for one of their homes contained a false statement.

1. After a jury trial in the United States District Court for the Eastern District of Missouri, petitioners were convicted on one count of transporting falsely made and forged securities, in violation of 18 U.S.C. 2314 (count 1), and one count of selling the securities, knowing them to have been falsely made and forged, in violation of 18 U.S.C. 2315 (count 2). Petitioner Weisser was sentenced to concurrent terms of five years' imprisonment on each count. Petitioner Hart was sentenced to 15 months' imprisonment on count 1 and three years' probation on count 2. The court of appeals affirmed.

The evidence at trial established that on December 17, 1982, 465 blank Travelers Express money orders were stolen from a market in Cahokia, Illinois. Shortly afterwards, petitioners met with a government informant in St. Louis, Missouri and sold her four of the money orders, each made out in the amount of $145 (Pet. App. 26-27). Petitioners subsequently were arrested; when law enforcement agents then searched petitioner Hart's home pursuant to a warrant, they discovered 88 more of the Travelers Express money orders made out in various amounts (*id.* at 27).

On appeal, the Eighth Circuit rejected petitioners' argument that the money orders did not constitute "evidence of indebtedness" and therefore were not "securities" within the meaning of 18 U.S.C. 2314 and 2315,[1] noting that "a Travelers Express money order is valid when imprinted with an amount on a machine furnished by Travelers Express" (Pet. App. 29).[2] The court of appeals also rejected petitioners' contention that the affidavit supporting the warrant for the search of Hart's home contained a false statement (Pet. App. 35 n.2).

2. The court of appeals plainly was correct in holding that the money orders handled by petitioners were securities within the meaning of Sections 2314 and 2315.[3] As the court

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[1]Section 2311 defines a security for purposes of Sections 2314 and 2315 to include, along with many specifically enumerated types of documents, any "evidence of indebtedness."

[2]In this case, of course, an unauthorized machine was used fraudulently to imprint the money orders (Pet. App. 29).

[3]The courts of appeals consistently have held that money orders may be securities within the meaning of the statute. See, *e.g.*, *United States* v. *Rochon*, 575 F.2d 191, 194 (8th Cir.), cert. denied, 439 U.S. 979 (1978); *United States* v. *Galardi*, 476 F.2d 1072, 1076 (9th Cir.), cert. denied, 414 U.S. 839 (1973); *United States* v. *Smith*, 452 F.2d 638, 640 (5th Cir. 1971), cert. denied, 406 U.S. 910 (1972); *Nelson* v. *United States*, 406 F.2d 1136, 1138 (10th Cir. 1969).

noted, a Travelers Express money order is validated when an amount is printed on it by an authorized machine (Pet. App. 29); any order so imprinted will be honored by Travelers Express. Tr. 52, 61-64. See *United States* v. *Smith*, 452 F.2d 638, 640 (5th Cir. 1971), cert. denied, 406 U.S. 910 (1972). At the point when an amount is entered on the order, then, an evidence of indebtedness — and thus a security —is created.

The cases cited by petitioners (Pet. 18-20) do not conflict with this conclusion. Those cases held that the completion of the blank portion of a stolen money order constitutes a false making, forgery, or alteration within the meaning of Section 2314, distinguishing an entirely blank form on the basis that the latter did not evidence an obligation. *United States* v. *Bedgood*, 453 F.2d 988, 990 (5th Cir. 1972); *Gearing* v. *United States*, 432 F.2d 1038, 1041 (5th Cir. 1970), cert. denied, 401 U.S. 980 (1971); *Castle* v. *United States*, 287 F.2d 657, 660 (5th Cir. 1961); *United States* v. *Smith*, 426 F.2d 275, 276 (6th Cir.), cert. denied, 400 U.S. 868 (1970); *United States* v. *DiPietto*, 396 F.2d 283, 286-287 (7th Cir. 1968); *Boyd* v. *United States*, 442 F.2d 1283, 1284-1285 (10th Cir. 1971).[4] In each of those cases, the money order forms at issue had been entirely completed; the courts therefore were not required to decide whether the fraudulent imprinting of a dollar amount would have been insufficient to render the forms "securities" within the meaning of the statute.[5] Indeed, nothing in the decisions

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[4] *United States* v. *Tasher*, 453 F.2d 244 (10th Cir. 1972), also cited by petitioners (Pet. 20), upheld a conviction under 18 U.S.C. 500; that case therefore is entirely inapposite to petitioners' Section 2314 and 2315 claims.

[5] Petitioners also argue that two Eighth Circuit cases conflict with the decision below (Pet. 18-19). These cases obviously do not create a conflict among the circuits. In any event, their holdings are entirely consistent with the decision here. In *United States* v. *Rochon*, 575 F.2d

suggests that the Eighth Circuit erred in concluding on the record before it that Travelers Express would have honored the altered forms that had been handled by petitioners.

3. Petitioners also challenge the affidavit supporting the search warrant for Hart's home. In particular, they argue that the affidavit is misleading when it reports that Hart "stated that the remaining stolen money orders were located at her residence at Columbia, Illinois. This statement was recorded by consensual monitoring by the * * * informant and has been verified by * * * the Affiant" (Pet. App. 37-38). In the recorded conversation between Hart and the informant referred to in this portion of the affidavit, the informant asked Hart "[d]id you bring them things today," and "[d]o you want a ride over and get em?" When another voice asked "[w]here," Hart responded "[o]ver to the house to get some more * * *." GX 17E, at 1. Although the agent who filed the affidavit declared that the final words on the tape were "money orders," the judge ruled that the transcript given to the jury should read "inaudible" at that point. GX 17E, at 1; Tr. 37-40, 46-48. In light of this background, petitioners maintain that the district court erred in failing to strike the agent's affirmation that he had verified Hart's statement.

This contention is baseless. In context, it is plain that the informant and Hart were discussing the stolen money orders (see Tr. 38, 40). In any event, petitioners have made no showing that the affiant made his statement recklessly or

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191, 194 (8th Cir.), cert. denied, 439 U.S. 979 (1978), the court simply stated that money order forms "unquestionably became 'securities' " when they were imprinted with an amount and filled in with the names of the purchaser and payee. *United States* v. *Jackson*, 576 F.2d 749, 755-756 & n.9 (8th Cir. 1978), held that blank stock certificates that clearly had not been validated were not securities — but the court added that other certificates, such as checks and money orders, could form the basis for a prosecution under Section 2315.

in bad faith. See *Franks* v. *Delaware*, 438 U.S. 154, 165 (1978). Petitioners' factual claim on this point has been rejected by both courts below; further review is unwarranted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

DECEMBER 1984

DOJ-1984-12